

1 JAMES C. STURDEVANT (SBN 94551)
 2 (jsturdevant@sturdevantlaw.com)
 3 MARK T. JOHNSON (SBN 76904)
 4 (mjohson@sturdevantlaw.com)
 5 ALEXIUS MARKWALDER (SBN 227004)
 6 (amarkwalader@sturdevantlaw.com)
 7 THE STURDEVANT LAW FIRM
 A Professional Corporation
 8 475 Sansome Street, Suite 1750
 San Francisco, CA 94111
 9 Telephone: (415) 477-2410
 10 Facsimile: (415) 477-2420

11 RANDALL P. CHOY (SBN 83194)
 12 (rchoy@hedenichoy.com)
 13 HEDANI, CHOY, SPALDING & SALVAGIONE, LLP
 14 595 Market Street, Ste. 1100
 San Francisco, CA 94105
 15 Telephone: (415) 778-0800
 Facsimile: (415) 778-0700

16 Attorneys for Plaintiff

17 **UNITED STATES DISTRICT COURT**
 18 **NORTHERN DISTRICT OF CALIFORNIA**

19 HEROES CLUB, INC., a California
 20 Corporation,

21 Plaintiff,

22 v.

23 UNITED PARCEL SERVICE, INC., and
 24 DOES 1-50,

25 Defendants.

CASE NO. CV 07-04422-JCS

CLASS ACTION

**PLAINTIFF'S OBJECTIONS TO, AND
 REQUEST FOR EXCLUSION OF,
 MATTERS OUTSIDE THE PLEADINGS
 SUBMITTED BY DEFENDANT UNITED
 PARCEL SERVICE IN SUPPORT OF
 ITS MOTION FOR JUDGMENT ON
 THE PLEADINGS**

26 Date: February 8, 2008
 27 Time: 9:30 am
 28 Courtroom: A, 15th Floor

Complaint filed: July 27, 2007
 Trial date: None set

1 Plaintiff Heroes Club hereby objects, on the grounds stated below, to the evidence which
 2 Defendant UPS has offered in support of its Motion for Judgment on the Pleadings in the form of
 3 Exhibits A through E attached to the declaration of Defendant's counsel, Annmarie C. O'Shea.
 4 Such documents purport to be UPS rate and service guides and UPS tariffs for various time
 5 periods. For the reasons stated below, and such other objections as may be made at the hearing
 6 of the motion, plaintiff requests that the Court exclude such extraneous matter and not consider
 7 such evidence, or any part of it, in ruling on the motion for judgment on the pleadings.

8 **The Exhibits to the O'shea Declaration Should be Excluded Because A Motion for
 Judgment on the Pleadings Must be Based Exclusively on the Pleadings, Without Reference
 to Extrinsic Evidence.**

10 A complaint is not subject to a motion to dismiss under Federal Rules of Civil Procedure,
 11 rule 12(c) for failure to state a claim on which relief can be granted unless the defect appears on
 12 face of complaint. Thus, it is improper for a court to consider material outside the complaint in
 13 ruling on such a motion. *Hal Roach Studios, Inc. v Richard Feiner & Co.*, 896 F.2d 1542, 1550
 14 (9th Cir. 1989); *R.J. Corman Derailment Servs., LLC v. Int'l Union of Operating Eng'rs, Local
 15 Union 150., AFL-CIO*, 335 F.3d 643, 647 (7th Cir. 2003).

16 Here, UPS's motion to dismiss relies, in part, on the extraneous documents it attaches as
 17 Exhibits A through E to the O'Shea Declaration. These documents purport to be UPS rate
 18 schedules and tariffs which UPS relies upon for the argument that plaintiff failed to satisfy a
 19 contractual condition precedent to recovery. (Def.'s MPA at 4-5.) None of these documents are
 20 attached to or even mentioned in the Complaint filed in this action. Nor are they relied upon by
 21 plaintiff in asserting its claims for relief in this action. To the contrary, plaintiff's Complaint
 22 relies exclusively on the contractual shipping records provided to plaintiff by UPS. Each time
 23 plaintiff's principal or employee completes a shipping record and provides it to UPS with a
 24 package to be shipped to a customer, he or she has the option of checking a box on the
 25 completed shipping record requesting that the customer's signature be obtained for an additional
 26 charge. Each time UPS accepts a package from plaintiff with the shipping record completed in
 27 that manner, it agrees to obtain the signature of the recipient as a means of confirming delivery
 28

1 of the package

2 By presenting the Court with these extraneous documents, UPS has introduced new and
 3 extraneous evidence for the very purpose of establishing an alleged fact beyond those stated in
 4 the Complaint. That alleged fact, that plaintiff somehow agreed to limitations on his right to
 5 pursue his claims in this action, is an affirmative defense which does not appear on the face of
 6 the Complaint and which, therefore, cannot be resolved on this Rule 12(c) motion. Accordingly,
 7 UPS's motion should be denied to the extent that it improperly relies on facts outside the
 8 Complaint. *See, e.g., Lee v. City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001) (reversing, in part, an
 9 order granting a Rule 12(b)(6) motion to dismiss on the basis that it improperly considered
 10 extrinsic evidence).

11 **The Exhibits to the O'shea Declaration Lack Authentication or Other Foundation**

12 Even if the Court were inclined to consider extraneous evidence in support of UPS's
 13 motion for judgment on the pleadings, Exhibits A through E are not admissible because they are
 14 not authenticated and there is no foundation or any evidence that they are what they purport to
 15 be. Fed. R. Evid. 901(a). Each exhibit in question is simply attached to the declaration of
 16 counsel for UPS in this case, Annemarie C. O'Shea, without further explanation. Although
 17 counsel states in her declaration that each exhibit is a true and correct copy of what it purports to
 18 be, there is no evidence other than her conclusory statement to that effect, that she has personal
 19 knowledge of that fact. She does not state, for example, that she prepared or filed the
 20 documents. Nor does she identify the origin of the attached documents or the location of the
 21 originals. Nor is there any evidence, such as a public seal or certification by the official
 22 custodian of records, that would permit these documents to qualify for self-authentication under
 23 Federal Rules of Evidence, rule 902.

24 Should this Court consider the submitted extraneous evidence on the motion for
 25 judgment on the pleadings it must do so by converting the motion to a motion for summary
 26 judgment and disposing of it as provided in Federal Rules of Civil Procedure, rule 56. *Hal*
 27 *Roach Studios*, 896 F.2d at 1550. Accordingly, such evidence must be admissible under Rule
 28

1 56(e) (“. . . affidavits shall be made on personal knowledge, shall set forth such facts as would be
2 admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the
3 matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an
4 affidavit shall be attached thereto or served therewith . . .”); *Orr v. Bank of Am.*, 285 F.3d 764,
5 773 (9th Cir. 2002) (“[w]e have repeatedly held that unauthenticated documents cannot be
6 considered in a motion for summary judgment”); *Cristobal v. Siegel*, 26 F.3d 1488, 1494 (9th
7 Cir. 1994) (“documents which have not had a proper foundation laid to authenticate them cannot
8 support a motion for summary judgment”) (internal quotations and citation omitted). Therefore,
9 neither the Declaration of Annemarie C. O’Shea nor the documents attached to the declaration
10 should be considered in ruling on UPS’s motion.

11 **CONCLUSION**

12 For the reasons stated above, plaintiff urges the Court to exclude from consideration on
13 Defendant’s Motion for Judgment on the Pleadings the Declaration of Annemarie C. O’Shea and
14 Exhibits A through E attached thereto.

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16 Date: November 30, 2007

Respectfully submitted,

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18 THE STURDEVANT LAW FIRM
A Professional Corporation

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HEDANI, CHOY, SPALDING
& SALVAGIONE, LLP

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By: /s/ Mark T. Johnson
MARK T. JOHNSON
Attorneys for Plaintiffs

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